89-1776

No. 90-

Supreme Court, U.S.
FILED
MAY 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MICHAEL R. FONTHAM,

Petitioner,

versus

COMMITTEE ON PROFESSIONAL RESPONSIBILITY, LOUISIANA STATE BAR ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR CERTIORARI

DAVID STONE
Counsel of Record
PAUL L. ZIMMERING
NOEL J. DARCE
Of
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Petitioner, Michael R. Fontham

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

May an attorney – who has an affirmative duty to represent his client competently and zealously – be punished for "conduct prejudicial to the administration of justice" because he files a letter in a court and serves it upon opposing counsel, informing the court of facts that may bear upon the impartiality of one of the sitting Justices, when that letter is factual, accurate and respectful, and is filed pursuant to the client's wishes?

LIST OF PARTIES TO THE PROCEEDING

Michael R. Fontham

Committee on Professional Responsibility,
Louisiana State Bar Association

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OPINIONS BELOW

The order enforcing the decision of the Louisiana Committee on Professional Responsibility was issued by the Louisiana Supreme Court on February 2, 1990. The Judgment of the Louisiana Supreme Court is unpublished and is reprinted in Appendix A at page A-1. A Formal Private Reprimand Notice letter was issued to Michael R. Fontham by the Louisiana Committee on Professional Responsibility on August 30, 1989. This decision also is unpublished and is reprinted in Appendix B commencing at page A-2.

JURISDICTION

The Committee on Professional Responsibility of the Louisiana State Bar Association determined that a private reprimand should be issued to petitioner, Michael R. Fontham, for writing a letter to the Supreme Court of Louisiana reporting facts relating to the impartiality of a justice in a case pending before the court, in which Fontham was counsel of record. Fontham sought an order from the Louisiana Supreme Court directing that the reprimand not be issued, relying in part on the First Amendment to the United States Constitution. This petition for a writ of certiorari seeks review of the decision of the Louisiana Supreme Court entered on February 2, 1990, which denied the requested order. This petition was filed within 90 days of February 2, 1990, as required by 28 U.S.C. § 2101(C) and Rule 13 of the Supreme Court Rules. Jurisdiction to review the judgment of the Louisiana Supreme Court by a writ of certiorari is conferred on this

Court by 28 U.S.C. § 1257(a) and by Rule 10.1(C) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Rule 8.4 of the Louisiana State Bar Association Rules of Professional Conduct provides in pertinent part:

> It is professional misconduct for a lawyer to:
>
> (d) Engage in conduct that is prejudicial to the administration of justice.

STATEMENT OF THE CASE

A. Introduction

In a proceeding before the Louisiana Supreme Court entitled *Cajun Electric Power Cooperative, et al. v. Louisiana Public Service Commission*, No. 88-CA-1719, in which Michael R. Fontham ("Fontham") represented the Louisiana Public Service Commission ("the Commission"), Fontham wrote a letter to the clerk regarding facts that might bear on the impartiality of Justice Luther Cole. [App. C at A-5]. Copies of the letter were provided to all counsel of

record and to Fontham's clients. That letter recited certain facts regarding the relationship of Mr. Robert Harbour to Justice Cole and the business relationship of Mr. Harbour to certain Louisiana electric cooperatives, seven of which were parties to the *Cajun* suit. With the exception of an inaccurate date,[1] the factual statements made in the letter were true and were verified by Mr. Fontham prior to sending the letter. The letter made no allegations or accusations, contained no disrespectful, abusive or insulting language, and made no misrepresentations. The Committee on Professional Responsibility of the Louisiana State Bar Association has conceded that it did not contend any statement in the letter was untrue; moreover, it did not argue that the letter was abusive or insulting. [App. D at A-11, A-23; App. H at A-43].

The letter was received by the Louisiana Supreme Court after its initial opinion in *Cajun*, but before it ruled on a request for rehearing. Information contained in the letter was reported in a newspaper article published in the Baton Rouge Morning Advocate *after* the Louisiana Supreme Court decided to grant rehearing in *Cajun*. Fontham did not provide a copy of that letter to the newspaper; he declined comment when asked about it by a reporter. Subsequently, the Louisiana Supreme Court reversed its initial opinion and ruled in the Commission's favor in *Cajun*.

---

[1] The letter stated that "Brooks-Harbour was paid in excess of $50,000 by *Cajun* in 1987." In fact, Brook-Harbour received those funds in 1988.

On January 31, 1989, a letter was sent to the Committee on Professional Responsibility signed by several attorneys, who "all have known Justice Luther F. Cole for many years." [App. E at A-30]. That letter accused Fontham of violating the canons of ethics by making "improper insinuations against one of Louisiana's most respected jurists" and by using an improper procedure to bring the matter to the attention of the court. [*Id.* at A-33]. On August 30, 1989, a Formal Private Reprimand Notice letter was sent to Fontham by the Committee, stating that the "combined" effect of the newspaper publication of the content of the letter with the absence of a motion to recuse "resulted in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d) of the Rules of Professional Conduct" and warranted a private reprimand. [App. B at A-3]. An application to the Louisiana Supreme Court for an order prohibiting the Committee from issuing the reprimand was filed on September 11, 1989. That application raised the issue of whether an attorney who makes accurate, factual and respectful statements in a letter filed with the court, regarding the impartiality of a sitting justice, is protected from punishment by the First Amendment of the United States Constitution.

The court denied the application on February 2, 1990. Fontham thereafter was notified by the Committee that the "private" reprimand would be sent to Justice Cole. Fontham was informed that it would be made part of his permanent record. [App. F at A-38]. Since the reprimand is the result of a disciplinary proceeding, Fontham must report it when applying for admission to courts

and in other situations requiring the disclosure of disciplinary actions against him.

B. Factual Background

The petitioner, Michael R. Fontham, and the firm of Stone, Pigman, Walther, Wittmann & Hutchinson act as special counsel to the Louisiana Public Service Commission in a number of proceedings involving public utilities and public utility rates. This representation included recent litigation involving the jurisdiction of the Commission over electric cooperatives that provide service within the State of Louisiana.

In 1987, the Louisiana Supreme Court issued a decision suggesting the Commission had jurisdiction over electric cooperatives under the State Constitution. *Dixie Electric Membership Cooperative v. Louisiana Public Service Com'n*, 509 So.2d 1002, 1006-07 (La. 1987). Thereafter, the Commission issued an order announcing that it intended to exercise rate and service jurisdiction over all of the Louisiana electric cooperatives. Cajun Electric and six distribution cooperatives filed an injunction proceeding seeking to prohibit the Commission's attempt to exercise that jurisdiction.

The Louisiana Nineteenth Judicial District Court upheld the Commission's constitutional jurisdiction, and the cooperatives appealed to the Louisiana Supreme Court. Initially, the court in a 4-3 decision, reversed the decision of the district court. Justice Luther Cole participated in that decision and authored a concurring opinion that referred to the court's previous statement in *Dixie* as a "scrap of dictum." *Cajun Electric Power Cooperative, Inc. v.*

Louisiana Public Service Com'n, 532 So.2d 1372, 1380 (La. 1988), *rev'd on rehearing*, 544 So. 2d 362, (La. 1989). The Commission applied for rehearing.

C. Letter to the Louisiana Supreme Court

After the original *Cajun* decision was rendered by the Louisiana Supreme Court, members of the Commission and the Commission staff expressed surprise to Fontham that Justice Cole had participated. They informed Fontham that Justice Cole's son-in-law, Robert Harbour, was a principal in a consulting firm that provided extensive and substantial services to the electric cooperatives. Mr. Fontham was unaware until that time of the relationship of Justice Cole to Robert Harbour and of the relationship of Mr. Harbour to the electric cooperatives involved in the *Cajun* litigation. Mr. Fontham was asked by the Commission to determine what action could be taken regarding Justice Cole's participation in that decision.

In the ensuing weeks, Mr. Fontham attempted to confirm facts regarding Mr. Harbour's relationship to the electric cooperatives. He made inquiries of the members of the Commission staff who were familiar with the cooperatives, and employees of several cooperatives. A discovery request seeking related information was issued to the electric cooperatives as well.

Fontham was able to confirm that Mr. Harbour formerly had been a general manager of Dixie Electric and at the time was an owner of Brooks-Harbour & Associates, Inc. ("Brooks-Harbour"), a Baton Rouge engineering and consulting firm that performed substantial services for electric cooperatives. Further, he learned that Brooks-

Harbour had merged with or had acquired Barbay Engineers, an engineering-consulting firm that prepared rate and cost-of-service studies for the retail electric cooperatives, including those involved in the Louisiana Supreme Court *Cajun* litigation.

Fontham consulted with members of the Commission and Commission staff, the Commission's general counsel, the Commission's executive secretary, and other lawyers in the Stone, Pigman firm concerning the appropriate action to take. A motion for recusal was deemed inappropriate because the matter had already been decided by the court, with Justice Cole participating. It was decided that a motion for recusal would be difficult for the court and Justice Cole to deal with after the decision was rendered. Further, the standard for recusal in Louisiana appears to require a showing of actual bias. La. Code of Civil Proc. Art. 151(B)( ). Judges apparently are not bound by the ABA Model Code of Judicial Conduct.

Nevertheless, the Commission and counsel were concerned that the other members of the court should be aware of Justice Cole's relationship with Mr. Harbour in the deliberations concerning the rehearing application. In those deliberations, Justice Cole presumably would share his views with other justices. Mr. Fontham and those he consulted believed that the Commission was entitled to be ensured that all members of the court were aware of the relevant circumstances in considering the rehearing application.

A majority of the Commission indicated that they wished that the matter be brought to the attention of the Louisiana Supreme Court. After consultation with the

general counsel of the Commission and its executive secretary, who is its former general counsel, Mr. Fontham determined that it was his duty as counsel to the Commission to communicate the pertinent information to the court. Mr. Fontham made this determination only after consultation with co-counsel in the firm. In addition, the decision was reviewed by several senior members of the firm and by the firm's management committee. Each attorney agreed that, given the facts and the client's wishes, Mr. Fontham and the firm had no choice but to inform the entire court of the pertinent information.

In addition to the above review, a senior member of the firm informally sought the advice of a respected senior member of the United States Court of Appeals for the Fifth Circuit, without naming the court or the parties involved in the case. The judge advised that in his opinion the relevant information should be brought to the attention of the court.

The letter to the Louisiana Supreme Court was hand delivered on December 7, 1988, after a review by several lawyers in the firm. It was addressed to the clerk. The full text of the letter follows:

> Subsequent to the issuance of the Court's opinion, counsel for the Commission was informed that Robert Harbour, a principal in the Baton Rouge firm of Brooks-Harbour & Associates, Inc., is married to Justice Luther Cole's daughter. Counsel is informed that Brooks-Harbour provides substantial services to most or all of the electric cooperatives in this case. Mr. Harbour formerly was the manager of Dixie Electric Membership Cooperative, Inc.
>
> Counsel is informed that Brooks-Harbour provides engineering and ratemaking services

to some or all of the electric cooperatives. In particular, we believe Brooks-Harbour performs studies for the electric cooperatives, which would be scrutinized by the Public Service Commission in the event the Commission's assertion of jurisdiction in this case were upheld. Further, we are informed that Brooks-Harbour receives substantial payments for services rendered to the cooperatives.

This information has caused great concern to the Commission.

Counsel has attempted to confirm the extent of services rendered by Brooks-Harbour to the cooperatives in this case, and payments received by Brooks-Harbour from them, through a data request in the proceeding pending before the Commission. These cooperatives objected to the data request on jurisdictional grounds. Through independent sources, counsel generally confirmed the information contained in this letter. Cajun Electric Power Cooperative, Inc., one of the seven appellants, provided an oral response today, which included the information that Brooks-Harbour was paid in excess of $50,000 by Cajun in 1987.

Counsel is informed by counsel for the electric cooperatives that Barbay Engineers, Inc. was acquired by Brooks-Harbour within approximately the past two years. The firm reportedly is also known as Barbay-Brooks-Harbour. Exhibit P-31, filed by Slemco in this case, is a rate and cost of service study prepared by Barbay Engineers prior to the acquisition. Other exhibits filed by the plaintiffs refer to studies prepared by Barbay Engineers prior to the acquisition. They include: Ex. 39 (Sleca); Ex. 25, p. 3 (Slemco); Ex. 27, p. 5 (Slemco); Ex. 28, p. 4 (Slemco); Ex. 17, p. 7 (Teche); Ex. 19 (Teche); Ex. 24A, p. 1 (Jeff. Davis); Ex. 30, p. 2 (Northeast).

> We believe it is our obligation to transmit this information to the Court. We assume that Justice Cole has evaluated the information for the purpose of determining whether to participate. We wish to ensure that all members of the Court are apprised of these circumstances.
>
> Please transmit this letter to the Court.
>
> [App. C at A-5-7].

The letter was served upon opposing counsel and copies were sent to Mr. Fontham's client, the members of the Commission, its general counsel and its secretary. Mr. Fontham did not provide the letter to the press. The Louisiana Supreme Court granted rehearing in the *Cajun* matter on December 15, 1988, and two days later, on December 17, 1988, the newspaper article discussing the contents of the letter appeared in the Baton Rouge Morning Advocate.

D. Proceedings Before the Committee

Members of the Baton Rouge bar filed a complaint against Fontham with the Committee. [App. E at A-30-35]. In addition, a Baton Rouge judge wrote a letter to the Committee questioning Fontham's conduct. [App. G at A-39-40]. The Committee sought and received a response from Fontham.

On August 30, 1989, the Committee issued a Formal Private Reprimand Notice letter to Fontham. [App. B at A-2-4]. The Committee concluded that Fontham violated Rule 8.4(d) of the Rules of Professional Conduct. It concluded:

> That the combined effect of the public disclosure of the contents of your letter, combined with the fact that no Motion To Recuse was filed, resulted in situation where the impartiality of a Supreme Court justice has been called into question without the opportunity for a hearing and decision on the merits of that issue as provided for in La. C.C.P. Arts. 151 and 159. That you have engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d) of the Rules of Professional Conduct of the Louisiana State Bar Association.
>
> [App. B at A-3].

The notice letter did not find that any statement made by Fontham was false or misleading, nor did it find that Fontham disclosed the letter to the press.

In fact, in a pleading filed with the Louisiana Supreme Court, the Committee admitted that it "does not reach any conclusions as to the accuracy of the representations alleged in Mr. Fontham's letter." [App. H at A-43]. Further, it admitted that "[t]he Committee does not find that Mr. Fontham either did or did not personally forward a copy of the letter in question to a member of the press," although it was "foreseeable" that "someone would release the letter to the press. . . ." [*Id.*]. The Louisiana Supreme Court denied Fontham's application on February 2, 1990, without opinion. [App. A at A-1].

REASONS FOR GRANTING THE WRIT

The factual statements in Fontham's letter to the Louisiana Supreme Court are protected under the First

Amendment to the United States Constitution. The statements concededly were true; no argument has been made that they were disrespectful. Moreover, Fontham had an affirmative duty in the representation of his client to bring to the court's attention matters which might affect his client's interest in the pending litigation and to represent his client zealously within the bounds of the law. He did what he was ethically bound to do.

This Court should grant certiorari to determine whether an attorney may be punished for making truthful and respectful statements regarding a judge's impartiality in a letter to the court. State courts have struggled with the extent to which First Amendment guarantees may limit the application of disciplinary rules. This Court should make it clear, at least, that truthful factual statements – those that do not include any opinions – are protected. Review is essential to ensure that attorneys, like other citizens, have the freedom to express the truth in carrying out their professional responsibilities.

A. THE RULINGS OF THIS COURT INDICATE THAT FONTHAM'S STATEMENTS HAVE FIRST AMENDMENT PROTECTION.

The statements in Fontham's letter contained accurate statements of fact that might bear on the impartiality of a justice. The letter stated that counsel had been informed that: 1) Robert Harbour, a principal in Brooks-Harbour & Associates, Inc., "is married to Justice Luther Cole's daughter"; 2) "Brooks-Harbour provides substantial services to most or all of the electric cooperatives in

this case;" 3) Mr. Harbour formerly was "the manager of Dixie Electric Membership Cooperative, Inc.; " 4) Brooks-Harbour "provides engineering and ratemaking services to some or all of the electric cooperatives" and performs studies "which would be scrutinized by the Public Service Commission in the event the Commission's assertion of jurisdiction in this case were upheld;" and 5) "Brooks-Harbour receives substantial payments for services rendered to the cooperatives." [App. C at A-5-6]. The letter also detailed Fontham's efforts to confirm the information. [*Id.* at A-6]. The letter stated that these circumstances caused "great concern" to Fontham's client, the Public Service Commission, but contained no conclusory criticisms or opinions regarding Justice Cole or his conduct. [*Id.*].

Fontham may not be punished for making accurate factual representations to the court on behalf of his client. His right to make accurate statements is protected by the free speech and right to petition clauses of the First Amendment to the United States Constitution. These provisions extend to lawyers engaged in the representation of clients; they protect *all* true factual representations and even false statements made with a reasonable belief in their truth, at least in the absence of a clear and imminent threat to the administration of justice. The reprimand of Fontham violates these provisions.

Although the courts have struggled with the application of First Amendment protections in instances of alleged professional misconduct, they consistently recognize that First Amendment rights must be respected even by disciplinary committees acting for the State. Thus, in *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9

L.Ed.2d 405 (1963), this Court ruled that professional standards banning solicitation could not be used to bar lawyers from advising people of violations of their rights and referring them to specific lawyers. 371 U.S. at 444-45, 83 S.Ct. at 344. It said: "[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439, 83 S.Ct. at 341. The Court determined that a state may restrict the free speech rights of attorneys " 'only upon a showing of a subordinating interest which is compelling.' " *Id.*, citing *Bates v. Little Rock*, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960). It ruled that the interest of the state in regulating the improper solicitation of legal business by the members of the state bar did not justify banning the activities of the NAACP lawyers. *Id.* at 344.

This Court also has determined that states cannot punish an attorney for making statements that are not actually misleading or inherently misleading. In *In Re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), the Missouri Supreme Court issued a private reprimand against a member of the Missouri Bar who violated Missouri's restrictions on attorney advertising. The attorney had listed areas of practice that were prohibited by Missouri disciplinary rules in an advertisement and had sent announcement cards to non-clients.

This Court found that the private reprimand violated the First Amendment because it punished the attorney for speech that was not in fact misleading and which was not inherently misleading. It determined that the State of Missouri could not, under the First Amendment, regulate

the attorney's speech except "in a manner no more extensive than reasonably necessary to further substantial interests." *Id.* at 939. The Court determined:

> There is no finding that appellant's speech was misleading. Nor can we say that it was inherently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception. We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. . . .
>
> *Id.* at 206-07, 102 S.Ct. at 939.

This case was a logical extension of the Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), where the Court held that the State could not punish "truthful advertisement concerning the availability and terms of routine legal services." *Id.* at 384, 97 S.Ct. at 2709.

This Court has also addressed limits on liability for statements made by attorneys critical of the judiciary. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), the Court reversed the criminal libel conviction of an attorney who publicly criticized eight criminal district court judges at a press conference. The Court required the application of the *New York Times v. Sullivan* standard to the attorney's statements, which "absolutely

prohibit punishment of truthful criticism" and the "punishment of false statements, unless made with knowledge of the falsity or in reckless disregard to whether they are true or false." *Id.* at 78, 85 S.Ct. at 217.

Courts have the authority to punish truthful statements made by an attorney under the First Amendment *only* if it is demonstrated that the attorney's statements are " 'a serious and imminent threat to the administration of justice.' " *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970); *In Re Oliver*, 452 F.2d 111 (7th Cir. 1971); *See, Craig v. Harvey*, 331 U.S. 284, 67 S.Ct. 1239, 91 L.Ed. 1492 (1947). In *Chase*, the trial court issued a *sua sponte* pretrial gag order prohibiting all discussion by all persons involved of all matters relevant to trial, until completion of the trial. The Seventh Circuit struck down the order, holding:

> Before a trial court can limit defendants' and their attorney's exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings . . . establishing that defendants, and their attorney's conduct is "a serious and imminent threat to the administration of justice."
>
> 435 F.2d at 1061.

The *Chase* court applied to attorney statements the same standard previously applied by this Court to non-attorneys in *Craig*. That case adopted a "clear and present danger to the administration of justice" test for attempts to punish persons who make statements critical of the judiciary.

Some courts that have recently examined the scope of First Amendment protection in ethics proceedings also have indicated that true factual statements made about

judges generally may not be punished. In *Ramirez v. State Bar of California*, 619 P.2d 399 (Cal. 1980), the California Supreme Court upheld a one year suspension of an attorney who falsely maligned three California appellate judges, only because it was demonstrated that the statements made were either knowingly false or were made with reckless disregard of the truth. *Id.* at 404. As this Court said, "the knowingly false statements and the false statement, made with reckless disregard of the truth, do not enjoy constitutional protection." *Id.*

That standard has recently been adopted by the Supreme Court of West Virginia as well. In *Committee on Legal Ethics of the West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W.Va. 1988), the West Virginia Committee suspended an attorney for statements critical of two judges as being "prejudicial to the administration of justice." *Id.* at 326. The court found that no punishment could be inflicted on an attorney unless the lawyer's speech either was "knowingly false" or "made with a reckless disregard of the truth" or if the statement "presents a serious and imminent threat to the fairness and integrity of the judicial system." *Id.* at 332. *See also Baker v. Monroe County Bar Association*, 34 A.2d 229, 311 N.Y.S. 2d 70 (N.Y. 1970) (attorney's criticisms of surrogate and law firm not protected because made with knowledge of falsity); *Dowling v. Alabama State Bar*, 539 So.2d 149 (Ala. 1989) (ethical standards relating to political advertisement by attorney narrowly construed in accordance with knowing falsity or reckless disregard standard.)

These standards set forth a reasonable approach to dealing with attorneys' statements concerning the judiciary. First, with respect to statements that are merely

factual, these statements should be protected if true, or even if false, if the statements were made without a reckless disregard for the truth. Second, statements that reflect opinions, such as an attorney's criticisms of a judge's abilities or motives, should be protected unless they pose a serious and imminent threat to the integrity of the judicial system. This second category perhaps reflects a necessary restriction of attorneys' freedom, because a lawyer's criticism of a judge could have an impact on the judicial system that is not threatened by other opinions.

In this case, Fontham's letter merely stated facts potentially relating to the impartiality of a justice. It did not draw conclusions, make accusations, voice criticisms, or otherwise assert opinions concerning these facts. To the extent that the administration of justice could be affected by the letter, it is affected by simple statements of fact. Under the First Amendment, Fontham cannot be punished for making accurate representations of fact. Yet the Committee does not dispute the accuracy of the letter, much less make a finding that it was false *and* sent with reckless disregard of the truth. [App. H at A-43].

The Committee tried to justify its reprimand by claiming that the statements were punishable since they were not made in a motion for recusal. But Fontham did not seek to force the recusal of Justice Cole, who already had participated in the case. A motion for recusal would likely have caused embarrassment to the court and would have required a showing of actual bias. Fontham sought to make the entire court aware of the relevant facts, since Justice Cole's participation in deliberations could affect the views of the other justices in deciding the merits.

The Committee's justification boils down to the proposition that an attorney may not speak the truth regarding a judge's interest in a case in any manner except by a motion for recusal. No ethical or procedural rule imposes this limitation. The Committee's argument is a pretext to justify punishing Fontham for what he wrote. This point is exemplified by the Committee's other basis for the reprimand – the "public disclosure" of Fontham's statements. [App. F at A-37]. Public disclosure would have been just as likely or more likely had a motion been filed.

In addition, the courts recognize that attorneys have an affirmative obligation to be vigorous advocates and that the First Amendment protects vigorous advocacy. *NAACP v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972); *Chocallo v. Bureau of Hearings and Appeals*, 548 F. Supp. 1349 (E.D. Pa. 1982).

Further, the First Amendment also guarantees the right to "petition the government for a redress of grievances." This provision is applicable to the states. *Richards Furniture Corp. v. Board of County Com'rs of Anne Arundel County*, 196 A.2d 621 (Md. 1963). It applies equally to attorneys. *In re Richmond*, 591 P.2d 728 (Or. 1979).

The right to petition is logically implicit in and fundamental to the very idea of a republican form of government. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342 (7th Cir. 1977). It cannot be abridged except upon a showing of actual malice i.e., " 'knowledge that the words are false, or . . . without probable cause or without checking for truth by the issue at hand.' " *McDonald v.*

Smith, 472 U.S. 479, 485, 105 S.Ct. 2787, 2791, 86 L.Ed.2d 304 (1985). The letter is not punishable under this standard because the statements in it were not false.

In this case, no criticisms or opinion-type accusations were levied against Justice Cole. No factually incorrect statements were made. The Committee seeks to discipline Fontham for informing the Louisiana Supreme Court of truthful facts relating to the impartiality of one of the Justices. The information was sent to the court only after verification, soon after the information was discovered. It was filed with the clerk and it was served upon all counsel of record. It was not distributed to the press by Fontham. It created no imminent threat to the impartial administration of justice, and the Committee made no finding that it did so. The letter is protected under the First Amendment.

B. REVIEW BY THIS COURT IS NECESSARY TO PROVIDE GUIDANCE TO THE STATES IN APPLYING ETHICAL STANDARDS IN THE FIRST AMENDMENT CONTEXT.

Review of this case by the Court is also important to provide guidance to the states regarding the application of ethical standards to attorneys who exercise the right of expression or the right of petition on behalf of their clients. The state courts have issued inconsistent rulings concerning the applicability of the First Amendment in disciplinary cases, and even have expressed concern that inadequate guidance has been provided by this Court.

As noted in Section A, some state courts have applied the *New York Times* standard in attorney disciplinary proceedings, protecting statements that are true or made without actual malice. Others, following more traditional theories, have ruled that the First Amendment is subsidiary to the canons of ethics. Thus, for example, in *Kansas v. Nelson*, 504 P.2d 211 (Kan. 1972), the Supreme Court of Kansas determined that the "consensus" of decisions established that "an attorney's right to free speech is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held." *Id.* at 214. Further, it interpreted a ruling of this Court as establishing that "the right to free speech may not be invoked to protect an attorney against discipline for unethical conduct." *Id.* It specifically ruled that *New York Times* was inapplicable. *Id.* Similarly, in *In the Matter of Frerichs*, 238 N.W.2d 764 (Ia. 1976), the Iowa Supreme Court held that a lawyer "may have some fewer rights of free speech than would a private citizen." *Id.* at 769.

Further, state courts have recognized a need for guidance from this Court on the application of the First Amendment in attorney discipline cases. In *Committee on Legal Ethics of the West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W.Va. 1988), the West Virginia Supreme Court stated:

> Another general observation which can be made is that most of the disciplinary cases involving attorneys speaking critically of the judiciary . . . are brought under DR 1-102(A)(5). In the majority of these cases, the courts have not been attentive to First Amendment free speech guidelines . . . Part of this inattention to the First Amendment arises from the lack of any clear

> precedent from the United States Supreme Court. It has not expressly decided whether the strictures of the Code of Professional Responsibility, which are aimed at curbing a lawyer's criticism of the judiciary . . . are to be interpreted in light of First Amendment free speech protection. *Id.* at 329.

Absent clear guidance from this Court, state courts may continue to be reluctant to apply First Amendment protections.

This case presents an opportunity for the Court to clarify the law in an area of extreme importance to our judicial system. Attorneys simply must have the right to speak the truth on behalf of their clients. The application of vague disciplinary rules to punish a lawyer for disclosing facts concerning the impartiality of a judge infringes free expression and the right to petition the government. The Court should clarify the law to at least establish that truthful, factual statements uttered by an attorney cannot be punished.

CONCLUSION

The statements in Fontham's letter were accurate. No opinion-type criticisms of a justice were contained in the letter. The language was restrained and respectful. Therefore, Fontham's statements are protected by the free speech and right to petition provisions of the United States Constitution. This Court should grant certiorari to clarify the law regarding the application of the First Amendment in disciplinary proceedings and to ensure that truthful statements cannot be punished as "unethical."

Respectfully submitted,

DAVID STONE
Counsel of Record
PAUL L. ZIMMERING
NOEL J. DARCE
Of
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130

Attorneys for Petitioner,
Michael R. Fontham

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APPENDIX A

The Supreme Court of the State of Louisiana

LSBA IN RE: COMM. FILE NO. 10230

NO. 89-OB-2161

IN RE: ___ Confidential Party ___; – Other(s); Applying for Appeal of Decision of Committee on Professional Responsibility;

February 2, 1990

Appeal denied. Private reprimand with notice may be issued.

PFC

JAD

WFM

JLD

JCW

LEMMON, J., would grant the appeal.

COLE, J., recused.

Supreme Court of Louisiana

February 2, 1990

/s/ Frans Labranche
Clerk of Court
For the Court

APPENDIX B

EXHIBIT A

COMMITTEE ON PROFESSIONAL RESPONSIBILITY LOUISIANA STATE BAR ASSOCIATION

601 St Charles Avenue New Orleans, Louisiana 70130
(504) 566-1600

August 30, 1989

CERTIFIED/RETURN RECEIPT REQUESTED

Mr. Michael R. Fontham
Attorney at Law
546 Carondelet Street
New Orleans, Louisiana 70130

RE: FORMAL PRIVATE REPRIMAND NOTICE LETTER
COPR FILE NO. 10230

Dear Mr. Fontham:

The Committee on Professional Responsibility of the Louisiana State Bar Association has concluded its consideration of the complaint filed against you by Melvin A. Shortess, Charles Wm. Roberts, David W. Robinson, Victor L. Roy, III, A. Leon Hebert, Lawrence A. Durant, Charles L. Patin, Jr., Johnny C. Moore, and Ossie B. Brown. After considering all available evidence, it is the opinion of the Committee that a Private Reprimand with Notice to Justice Luther F. Cole is deserving and warranted. It is the opinion of the Committee that in your capacity as Attorney at Law, you were representing the Louisiana Public Service Commission before the Supreme

Court of Louisiana in a matter entitled *Cajun Electric Power Cooperative, Inc. v. Louisiana Public Service Commission*, docket number 88-CA-1719. That following the issuance of the Supreme Court opinion, and while an application for rehearing was pending before the Court, you did, on or about December 7, 1988, deliver to the Clerk of the Supreme Court of Louisiana a letter relating to Justice Cole's participation in the above detailed case which you did request that the Clerk of Court transmit to the Court. A copy of said letter is hereby attached and incorporated herein as if copied in extenso. That a copy of your letter was provided to a member of the press and as a result the content of the letter was disclosed in the Baton Rouge Morning Advocate. That you did not forward to the Court, either with your letter of December 7, 1988 or subsequently, a Motion to Recuse Justice Cole pursuant to La. C.C.P. Arts. 151 and 159. That the combined effect of the public disclosure of the contents of your letter, combined with the fact that no Motion To Recuse was filed, resulted in a situation where the impartiality of a Supreme Court Justice has been called into question without the opportunity for a hearing and decision on the merits of that issue as provided for in La. C.C.P. Arts. 151 and 159. That you have engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4 (d) of the Rules of Professional Conduct of the Louisiana State Bar Association.

In keeping with the provisions of Article XV, Section 5, you are hereby notified of the intent of the Committee on Professional Responsibility to issue a Private Reprimand with Notice. Under the provisions of said section, you shall have ten (10) days, after receipt of this notification,

within which to appeal to the Supreme Court for an order commanding the Committee not to send a copy of such reprimand to the complainant. If no appeal is made within that time, a reprimand will be drafted and issued.

Yours truly,

/s/ G. Fred Ours
G. Fred Ours
Assistant Counsel

GFO/kmf

APPENDIX C

STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
COUNSELLORS AT LAW
546 CARONDELET STREET
NEW ORLEANS, LOUISIANA 70130-3588
(504) 581-3200
TELECOPIER (504) 581-3361
TELEX 161708NLN

December 7, 1988

(Filed December 7, 1988)

BY HAND

88 CA 1719
28,392

Hon. Frans Labranche
Clerk of Court
Supreme Court of the
State of Louisiana
301 Loyola Avenue
New Orleans, Louisiana 70112

Re: Cajun Electric Power Cooperative, Inc. v. Louisiana Public Service Commission, No. 88-CA-1719

Dear Mr. Labranche:

Subsequent to the issuance of the Court's opinion, counsel for the Commission was informed that Robert Harbour, a principal in the Baton Rouge firm of Brooks-Harbour & Associates, Inc., is married to Justice Luther Cole's daughter. Counsel is informed that Brooks-Harbour provides substantial services to most or all of the electric cooperatives in this case. Mr. Harbour formerly was the manager of Dixie Electric Membership Cooperative, Inc.

Counsel is informed that Brooks-Harbour provides engineering and ratemaking services to some or all of the electric cooperatives. In particular, we believe Brooks-

Harbour performs studies for the electric cooperatives, which would be scrutinized by the Public Service Commission in the event the Commission's assertion of jurisdiction in this case were upheld. Further, we are informed that Brooks-Harbour receives substantial payments for services rendered to the cooperatives.

This information has caused great concern to the Commission.

Counsel has attempted to confirm the extent of services rendered by Brooks-Harbour to the cooperatives in this case, and payments received by Brooks-Harbour from them, through a data request in the proceeding pending before the Commission. These cooperatives objected to the data request on jurisdictional grounds. Through independent sources, counsel generally confirmed the information contained in this letter. Cajun Electric Power Cooperative, Inc., one of the seven appellants, provided an oral response today, which included the information that Brooks-Harbour was paid in excess of $50,000 by Cajun in 1987.

Counsel is informed by counsel for the electric cooperatives that Barbay Engineers, Inc. was acquired by Brooks-Harbour within approximately the past two years. The firm reportediy is also known as Barbay-Brooks-Harbour. Exhibit P-31, filed by Slemco in this case, is a rate and cost of service study prepared by Barbay engineers prior to the acquisition. Other exhibits filed by the plaintiffs refer to studies prepare by Barbay Engineers prior to the acquisition They include: Ex. 39 (Sleca); Ex. 25, p. 3 (Slemco); Ex. 27, p. 5 (Slemco); Ex. 28, p. 4

(Slemco); Ex. 17, p. 7 (Teche); Ex. 19 (Teche); Ex. 24A, p. 1 (Jeff. Davis); Ex. 30, p. 2 (Northeast).

We believe it is our obligation to transmit this information to the Court. We assume that Justice Cole has evaluated the information for the purpose of determining whether to participate. We wish to ensure that all the members of the Court are apprised of these circumstances.

Please transmit this letter to the Court.

Sincerely,

/s/ Michael R. Fontham
Michael R. Fontham
Of STONE, PIGMAN,
WALTHER, WITTMANN
& HUTCHINSON

MRF:jsh

cc: All Counsel
Members of the Louisiana
Public Service Commission
Marshall B. Brinkley, Esq.
Robert L. Rieger, Jr., Esq.

APPENDIX D

SUPREME COURT OF LOUISIANA

NUMBER 89-OB-2161

IN RE: COMMITTEE FILE NO. 10230

COMMITTEE ON PROFESSIONAL RESPONSIBILITY'S SUPPLEMENTAL BRIEF

LOUISIANA STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL RESPONSIBILITY

Frank J. Gremillion, Chairman
Elizabeth A. Alston
Robert J. Boudreau
Trevor G. Bryan
Robert M. Contois, Jr.
William W. Hall
Carrick R. Inabnett
T. Haller Jackson, III
Harvey J. Lewis
Christine Lipsey
Edmund McCollam
Gerard F. Thomas, Jr.

G. Fred Ours, Assistant Counsel
Gerald F. Thomas, Committee Member Assigned

601 St. Charles Avenue
New Orleans, Louisiana 70130
Phone: (504) 566-1600

SUPREME COURT OF LOUISIANA

NUMBER 89-OB-2161

IN RE: COMMITTEE FILE NO. 10230

COMMITTEE ON PROFESSIONAL RESPONSIBILITY'S SUPPLEMENTAL BRIEF

INTRODUCTION

While his Application For Rehearing of a four to three decision was pending before the Louisiana Supreme Court, Respondent mailed a letter to the Court and his clients, the member of the Public Service Commission. A copy of the letter is attached hereto as "Exhibit A". The letter concerns Justice Cole's participation in deciding the case. Justice Cole was one of the Justices in the four to three majority, whose opinion Respondent sought to reverse via his Application For Rehearing. Respondent did not file a Motion To Recuse Justice Cole. Following receipt of a complaint from several members of the Bar, the Committee on Professional Responsibility carefully reviewed the matter, including the response of the Respondent. The Committee determined that a Private Reprimand With Notice was the appropriate discipline for the violation of Rule 8.4 (d), conduct prejudicial to the administration of justice. The violation was occasioned by Respondent's raising the issue of a justice's impartiality by letter, rather then by a Motion to Recuse, combined with the fact that a copy of the offending letter was provided to a member of the press and was published. A copy of the proposed reprimand is attached and labeled as "Exhibit B".

The proper procedure for the recusal of a Supreme Court Jusitce [sic] is found in the La. Code of Civil Procedure at Arts. 151 and 159. The offending letter, "Exhibit A", does not request that Justice Cole be recused. "Exhibit A" was not considered by the Court as a Motion To Recuse.

In his thirty-eight (38) page, plus attachments, supplemental brief, Respondent raises three issues. To wit:

1. Does the free speech provision of the U.S. Constitution provide Respondent with a shield which protects him from discipline relative to "Exhibit A", the offending letter?

2. Is the Committee on Professional Responsibility precluded from disciplining Respondent for violating Rule 8.4 (d) simply because it did not also charge or find Respondent guilty of violating Rule 8.2 (a)?

3. Whether or not "Exhibit A", the offending letter, is a proper substitute for a Motion To Recuse?

The main thrust of this brief is to establish that Respondent's position on these issues is without merit and that Respondent is guilty of a violation of Rule 8.4 (d) for which he should be disciplined.

I

The Free Speech Issue

Respondent basically contends that, under the 1st Amendment free speech clause, an attorney cannot be disciplined for making an accurate statement about a judge, regardless of the context or vehicle used to make

that statement. Respondent would apply this standard even to a false statement if made without reckless disregard for the truth. This premise may, at first blush, seem reasonable and sound. However, a little thought shows that the premise is over simplistic and must be considered with some care. For example: if a particular judge graduated at the bottom of his law school class and his parents were not married when he was born, it is quite possible to argue that it would be an accurate statement, or at least it would not involve a reckless disregard of the truth, to state that the judge was a dumb bastard. The First Amendment would, therefore, permit an attorney to so address the judge in open court before a jury. Obviously, any lawyer who did so could be punished for contempt of court, and be subject to professional discipline, the First Amendment notwithstanding.

In reviewing and discussing Respondent's First Amendment argument, it must be remembered that the Committee does not seek to discipline Respondent for what he said. Clearly the gist of the offending letter, "Exhibit A", could have properly been placed into the text of a Motion To Recuse. Discipline is sought because of the vehicle Respondent used to question Justice Cole's impartiality, which did not provide for a hearing, and the foreseeability of the newspaper publicity concerning the allegations.

In raising this first Amendment issue relative to disciplinary proceedings, Respondent cites cases which are clearly distinguishable from the matter before the Court.

Respondent cites *N.A.A.C.P. v. Burton*, 371 U.S. 415, 83 S.Ct. 328 (1963). This United States Supreme Court

case involves a situation where Virginia modified its rules on attorney solicitation in an attempt to stop the N.A.A.C.P. from providing lawyers for plaintiffs in desegregation suits. The Court held that the activities of the N.A.A.C.P., its affiliates, and legal staff were modes of expression and association which could not be prohibited under the solicitation regulations applying to the legal profession. In so ruling, the court noted that:

> . . . .We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia, litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.
>
> (footnotes omitted)

Mr. Justice Douglas' concurring opinion makes it clear that this is a civil rights case and not an attorney discipline case.

Respondent also cites *In Re R.M. J.*, 455 U.S. 191, 102 S. Ct. 929 (1982), and *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977), which are lawyer advertising cases having nothing to do with criticizing the judiciary. As such they are clearly distinguishable from Respondent's case, which has absolutely nothing to do with the advertising of legal services.

Respondent next cites *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209 (1964). While this case does involve

criticism of the judiciary, it does not involve an ongoing case, nor does it involve attorney discipline. This case arose when the Orleans Parish District Attorney criticized the work habits of the Criminal Court bench. The judges responded by initiating a prosecution for criminal liable [sic]. The United States Supreme Court held that Garrison could not be held civilly liable for his comments under the *N.Y. Times v. Sullivan* case, and applied that civil liability standard of malice to the Louisiana Criminal Liable [sic] Statute which had no such requirement. It should be noted that the *Garrison* case did not involve a particular ongoing case. The instant case before this court involves a four to three decision, adverse to Respondent's client, wherein Respondent's Application For Rehearing was pending when the letter criticizing the participation of one of the Justices in the majority was delivered. The Garrison case is clearly distinguishable.

Respondent next cites two United States Court of Appeals decisions from the Seventh Circuit, *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970). *In Re Oliver*, 452 F.2d 111 (7th Cir. 1971), and the United States Supreme Court decision *Craig v. Harvey*, 67 S.Ct. 1249 (1947), for the proposition that truthful statements made by an attorney may be punished only if the statements constitute "a serious and imminent threat to the administration of justice." The *Chase* case involved a District Court order prohibiting the parties and their lawyers in a criminal case from making any public statements about the case. The *Oliver* case involved a District Court reprimanding a layer for violating a blanket prohibition against all extra judicial comment by counsel in all pending cases whether tried before judge or jury. *Chase* and *Oliver* are gag order

cases having little applicability to the facts in the instant case. The *Craig* case involved a newspaper editor, editorial writer, and reporter who were held in contempt and sentenced to jail for critizing [sic] a non-lawyer, holding elected office as a judge in Texas, for refusing to accept a jury's verdict and ordering the jury to change their verdict. The *Chase* case is a freedom of press case having nothing to do with attorney discipline.

Respondent next cites *Ramirez v. State Bar of California*, 619 P.2d 399 (Cal. 1980) for the proposition that true statements about judges generally may not be punished. The *Ramirez* case does not so hold. Ramirez claimed that the California Bar did not have jurisdiction to proceed against him for statements made in court pleadings because to do so would infringe upon his First Amendment right to freedom of speech. In deciding this claim, the Supreme Court of California said at page 404 that:

> [1-3] Petitioner's contention as to jurisdiction is without merit. It is settled this court has inherent power to regulate the practice of law and discipline members of the bar when such discipline is warranted. Moreover, *this court has jurisdiction to discipline member attorneys for* defamatory or *disrespectful statements contained in pleadings or other court papers.* In Philbrook *this court specifically rejected the argument that "outrageous" and "unwaranted" statements concerning a justice of this court were protected by "free speech" considerations.* The United States Supreme Court, in addressing First Amendment protections of false statements made with reckless disregard for the truth, stated that "[c]alculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that

> any benefit that might be derived from them is clearly outweighed by the social interest in order and morality . . . 'Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." As has been demonstrated, *petitioner's several demeaning statements* have been made with reckless disregard of the truth.
>
> (citation omitted – emphasis added)

Clearly, the California Court upheld Ramirez' one year suspension for making demeaning statements with reckless disregard of the truth. In doing so, the California Court stated unequivically that they could discipline an attorney for making disrespectful statements and outrageous and unwarranted statements as well as false statements. The California Court's decision contains no requirement that an attorney's statements which are disrespectful, or outrageous or unwarranted be also untrue in order to invoke the disciplinary jurisdiction of the Court.

In Committee on Legal Ethics of The West Virginia State Bar v. Douglas, 370 S.E.2d 325 (W.Va. 1988), the West Virginia Court remanded the matter for further development of the facts. In this case, two circuit court judges initiated an investigation involving Douglas, a lawyer. The judges scheduled an informal hearing and ordered the parties not to make any comments to the press concerning the investigation. The gag order was violated. The West Virginia Court found the facts surrounding the violation of the gag order to be as follows:

> On August 30, 1985, an article appeared in the Braxton Democrat Central, a weekly newspaper. The article was titled "JUDGES SOMMERVILLE-CLINE ORDER INVESTIGATION: DOUGLAS, KING MINIGH TARGETED," and detailed the charges in the lis pendens order.
>
> A follow-up article appeared on September 6, 1985, under the heardline [sic]" "DOUGLAS IGNORES GAG ORDER." The respondent was quoted extensively in the article. *He attacked the circuit judges for attempting to prohibit public comment on the investigation*: "I have much disdain and contempt for the gag order." He also attributed the investigation to "political expedience," and described it as "a farse [sic] and a thinly disguised attempt at 'power jockeying'." He concluded by observing that the judges "drew first blood" and that he would "rise to the challenge."
>
> The newspaper article was accompanied by a photograph of the respondent dressed in military fatigues and armed with a facsimile bow and arrow, a knife, and rifle ammunition. A caption beneath the photograph quoted the respondent and read, in part: "Just like Rambo I'll defend against the judges alone if necessary."
>
> (Emphasis added)

At least in part, the misconduct involved criticizing and violating the gag order. The misconduct did not involve the representation of a client but rather involved the lawyer as the target of the investigation. The facts are distinguishable from the instant case.

In remanding the case, the West Virginia Court discussed the First Amendment. In doing so they stated that:

> Another general observation which can be made is that most of the disciplinary cases involving attorneys speaking critically of the judiciary or the judicial system are brought under DR 1-102(A)(5). *In the majority of these cases, the courts have not been attentive to First Amendment free speech guidelines.* Annot., 12 A.L.R.3d 1408 (1967); cf. Annot., 68 A.L.R.3d 273 (1976). *Instead, they have focused on whether the speech would undermine public confidence in the judicial system.* E.g., In re Friedland, 268 Ind. 536, 376 N.E.2d 1126 (1978); In Re Paulsrude, 311 Minn. 303, 248 N.W. 2d 747 (1976); In Re Lacey, 283 N.W.2d 250 (S.D.1979); In Re Raggio, 87 Nev. 369, 487 P.2d 499 (1971)
>
> Part of this inattention to the First Amendment arises from the lack of any clear precedent from the United States Supreme Court. It has not expressly decided whether the strictures of the Code of Professional Responsibility, which are aimed at at [sic] curbing lawyers' criticism of the judiciary or the judicial system, are to [be] interpreted in light of First Amendment free speech protection.
>
> (Emphasis added)

Baker v. Monroe County Bar Assn., 311 N.Y.S.2d 70 (N.Y.1970) and *Dowling v. Alabama State Bar*, 539 So.2d 149 (Ala. 1989) reiterate the well settled principle that false or misleading statements are not protected by the First Amendment. These cases do not hold that all truthful statements are protected by the First Amendment.

Respondent also cites *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972) The Chicago Seven Contempt proceedings, and *Chocallo v. Bureau of Hearings and Appeals*, 548 F.Supp. 1249 (E.D. Pa. 1982) for the propositions that an attorney has the obligation to be a vigorous advocate (*Dellinger*) and to

seek to disqualify a judge or justice who may be biased (*Chocallo*). These cases lead into Respondent's argument involving the right to petition the government for redress of grievances. In raising this argument, Respondent overlooks the fact that C.C.P. Art. 151 and 159 provide the appropriate format and vehicle for Respondent to petition the Louisiana Supreme Court for recusal of a justice of that Court. Respondent's right to petition is not being trampled by the Committee's decision to issue a private reprimand. If in fact Respondent had sufficient information or evidence to convince him that he could prevail on a Motion To Recuse, he had an obligation to file such a motion. He considered, but did not choose to file a Motion To Recuse.

First Amendment defenses have been discussed by other courts in disciplinary cases involving statements made by lawyers. In *State v. Nelson*, 504 P.2d 211 (Kan. 1972), the Supreme Court of Kansas discussed the First Amendment in connection with conduct prejudicial to the administration of justice. The court stated:

> Concerning respondent's argument that DR 1-102(A)(5) creates an impermissible and chilling effect on "First Amendment freedoms," an examination of decisions on the point (12 ALR.3d, Anno., p. 1408) reveals *the consensus to be that an attorney's right to free speech is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held.* In the case of In re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L. Ed.2d 1473, the last case in which the United States Supreme Court addressed itself to the subject, it appears that at least five Justices agreed that the right to free speech may not be invoked to protect an attorney against discipline for unethical conduct.
>
> (Emphasis added)

The Supreme Court of Nevada *In the Matter of Raggio,* 487 P.2d 449 (Nev. 1971) affirmed a public reprimand of a District Attorney who criticized the courts reversal of a murder case. The comments were made in a television interview. The Court detailed the statements of the District Attorney as follows.

> . . . . He characterized this court's opinion as "most shocking, certainly to this office, and I'm sure to anyone who has dealt with similar problems."; "The Witherspoon decision has clearly no application to the facts of this case, and the court in the majority opinion has frankly gone to a great extent to do some semantical gymnastics to come up with a situation which resembles the Witherspoon situation; and I feel very strongly as I sit here today faced with the task of – almost insurmountable task of reacquiring witnesses after some six or seven years and retrying the case.[2] I feel that its an example of judicial legislation at its very worst."; "In my opinion this is the most shocking and outrageous decision in the history of the Supreme Court of this State. It's unexplainable, and in my opinion totally uncalled for."

Mr. Raggio raised a First Amendment defense which was rejected by the Nevada Court.

The Supreme Court of Iowa *In the Matter of Frerichs,* 238 N.W.2d 764 (Iowa 1976) rejected a First Amendment defense in a disciplinary matter involving criticism of the court. In doing so they quoted both the Missouri and the United States Supreme Court as follows:

> A lawyer, acting in a professional capacity, may have some fewer rights of free speech than would a private citizen. As was well explained

in In re Woodward, 300 S.W.2d 385, 393-394 (Mo. 1957):

> " * * * Neither the right of free speech nor the right to engage in 'political' activities can be so construed or extended as to permit any such liberties to a member of the bar; respondent's action was in express and exact contradiction of his duties as a lawyer. A layman may, perhaps, pursue his theories of free speech or political activities until he runs a foul [sic] of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith * * *."

The United States Supreme Court had before it an attorney disciplinary proceeding in In re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959). On the "free speech" issue respondent raises here, Mr. Justice Stewart, concurring in result, clearly was speaking for at least five members of the court when he said:

> " * * * A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. * * *."
>
> – 360 U.S at 646-647, 79 S.Ct. at 1388, 3 L.Ed.2d at 1489.

Respondent's First Amendment contention in this case is misplaced and should be denied.

II

The 8.4(d) vs. 8.2(a) issue

Respondent basically alleges that Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice, is unconstitutionally vague and cannot be used to discipline Respondent because it is inconsistent with Rule 8.2(a), with which Respondent is not charged.

Rule 8.4(d) tracks the language of former DR 1-102(A)(5). Under both the old and the new rule, it is a violation for a lawyer to "engage in conduct that is prejudicial to the administration of justice". This standard is not unconstitutionally vague. *State v. Nelson* (supra) at 214, *Committee on Legal Ethics v. Douglas* (supra) at 328. In the 1988 *Douglas* case, the West Virginia Court noted that:

> There also appears to be general agreement that the "prejudicial to the administration of justice" standard contained in DR 1-102(A)(5) is not unconstitutionally vague. This is because the standard is considered in light of the traditions of the legal profession and its established practices. See *Parker v. Levy*, 417 U.S 733, 94 S.Ct. 2547, 41 LEd.2d 439 (1974); *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.3d 117 (1968) The Court *In re Keiler*, 380 A.2d 119, 126 (D.C.App.1977), in upholding the constitutionality of the rule against a vagueness claim, stated: "The rule was written by and for lawyers. The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required

> of rules of conduct for laymen." See also *State v. Martindale*, 215 Kan. 667, 527 P.2d 703 (1974).

In the *Nelson* case, the Kansas Court stated that:

> [1,2] With respect to issue three, respondent argues that the word "prejudicial" as it appears in DR 1-102(A)(5) is unconstitutionally vague and casts a "chilling effect on First Amendment freedoms." Respondent's position is unsupported in both instances. The word "prejudicial" is universally found throughout the legal and judicial system. Specific definitions are found in any dictionary. In *Prunty v. Light Co.*, 82 Kan. 541, 108 P. 802, this court, referring to Webster's Universal Dictionary, defined prejudicial as "hurtful," "injurious," "disadvantageous." It cannot be seriously contended that "prejudicial" does not sufficiently define the degree of conduct which is expected of an attorney.

The void for vagueness claim is clearly without merit.

Rule 8.4(d) and Rule 8.2(a) are not mutually exclusive. Rule 8.2(a) prohibits " . . . statements that the lawyer knows to be false or with reckless disregard as to its truth or falsity . . . " about a judge. Rule 8.2(a) directs itself specifically to false statements by a lawyer while Rule 8.4(d) directs itself to the broader scope of prejudicial conduct. Surely a statement is a type of conduct, but conduct is not necessarily a statement. A violation of Rule 8.2(a) (false statement) would also be a violation of Rule 8.4(d) (conduct prejudicial), but the reverse is not necessarily true. In *Louisiana State Bar Association v. Karst*, 428 So.2d 406 (La. 1983), this Court found Karst to be in violation of both DR 8.102(B), [the predecessor of rule 8.2(a)] and DR 1-102(A)(5), [the predecessor of Rule

8.4(d)]. A knowing false statement about a judge would clearly violate both Rules.

Here the committee does not seek to reprimand Respondent for the content of the offending letter (Exhibit A). Indeed, the allegations contained in the letter could have been contained in a Motion to Recuse pursuant to La. C.C.P. Arts 151 and 159. Had Respondent filed such a motion, there would be no violation of Rule 8.4(d). The contention that discipline is prohibited due to 8.2(a) is without merit.

III

The Letter vs. Motion To Recuse Issue

This issue encompasses the reason for the issuance of the Private Reprimand with Notice.

Respondent contends that: (a) a Motion To Recuse is not the only proper procedural vehicle available to recuse a Supreme Court Justice; (b) the letter provided Justice Cole with an opportunity to recuse himself; (c) some Federal Courts require counsel to list information so the judge can evaluate possible recusal; and (d) the letter meets the requirements of a motion. These arguments are specious and may be responded to as follows.

(a) Neither the Code of Civil Procedure nor the Louisiana Supreme Court Rules provide any procedural vehicle for recusal of a Supreme Court Justice except La. C.C.P. Arts 151 and 159. Respondent can point to no other court rule or statute which provides a vehicle for recusing a Supreme Court Justice.

(b) The letter specifically states in its last paragraph that:

> We believe it is our obligation to transmit this information to the Court. *We assume that Justice Cole has evaluated the information for the purpose of determining whether to participate.* We wish to ensure that all the members of the Court are apprised of these circumstances.
>
> (Emphasis added)

The text of the letter itself makes it clear that when he wrote the letter, Respondent believed that Justice Cole had already made a knowing decision that grounds for recusing himself did not exist. Clearly, the letter was not intended to bring some overlooked information to Justice Cole's attention so that he could recuse himself. If that were the letters purpose, it would have been sent only to Justice Cole. The clear intent to Respondent was to tell the other six justices, and the members of The Public Service Commission, that Respondent believed Justice Cole was improperly biased. The proper vehicle for doing this is a Motion To Recuse not a letter.

(c) The case was pending a rehearing application in the *Louisiana* Supreme Court, the highest *State Court* in Louisiana. What any Federal Court requires in its pleadings is totally irrelevant to the proper proceedures [sic] to be followed in a Louisiana State Court, where the La. Code of Civil Procedure is the controlling law.

(d) This brings us to Respondent's claim that he could raise the issue of Justice Cole's impartiality by letter because the letter met the requirements of a motion. Respondent ignores the mandatory requirements of La. C.C.P. Art. 962 that a motion " . . . *shall state* the grounds

therefore, and *the relief or orders sought*" (emphasis added). The offending letter (Exhibit A) does not comply with this mandatory requirement. The letter is not a motion. The court did not treat the letter as a Motion and Respondent specifically did not intend the letter to be considered as a Motion To Recuse. In his brief at p. 9 and 10, Respondent details that his client, The Public Service Commission, wanted the issue raised and that after due consideration Respondent specifically decided not to raise the issue by Motion To Recuse. In his brief beginning at p. 31, Respondent discusses the grounds for recusal in La. C.C.P. Art. 151. In doing so, he states that:

> Article 151 of the Code of Civil Procedure provides those grounds where a party has a right to cause a judge to be recused. The article specifies a number of specific fact circumstances requiring recusal, which are not applicable here. In addition, it requires recusal when a judge "(i)s biased, prejudiced, or interested in the cause of its outcome . . . to such an extent that he would be unable to conduct fair and impartial proceedings." La. C.C.P. Art. 151(B)(5). *Since the standard for applying this article appears to require actual bias, it was unclear whether it applied in this case.*
>
> (Emphasis added)

La. C.C.P. Art 151 provides the only legal grounds upon which a party can recuse a judge. Art 151(B)(5) is the only subpart of the article which the alleged facts set forth in the offending letter (Exhibit A) could conceivably relate to. Respondent has admitted in his brief that this subpart may not apply to Justice Cole's participation in this case, apparently because he didn't know if he could prove actual bias

It would not advance Respondent's client's position if a Motion To Recuse were filed and denied. La. C.C.P. Art. 159 provides that a Motion To Recuse a Supreme Court Justice" . . . *shall* be heard by the other justices . . . " (emphasis added). If Respondent filed a Motion To Recuse, a hearing would be held. Since Respondent was apparently unsure that he could prove *actual* bias, a hearing was not in his client's best interest. It would appear that rather than risk losing a Motion To Recuse, because he might not be able to prove actual bias, Respondent chose to write "Exhibit A" and mail it to the Court. He could thereby raise the issue without affording Justice Cole an opportunity to defend himself against the allegation.

In his brief beginning at p. 34, Respondent discusses his purpose in sending the letter. He states that:

> In addition, Fontham's client had the right to have the entire Court informed of the relevant facts, regardless of whether recusal was required. Decisions at the appellate level are the result of deliberations among all the judges of the Court. Obviously, some judges – particularly those with strong views on a matter – may influence the thinking of others. The disclosure of accurate facts bearing on the impartiality of a justice *advances* the administration of justice by permitting the members of the Court to evaluate the strength of views expressed by their brethren. A motion was not necessary to accomplish this purpose.

The purpose of the letter was not to recuse Justice Cole. The apparent purpose of the letter appears to have been to convince the other six Justices that Justice Cole was not impartial, and thereby diminish his influence

with his brethren. The purpose of the letter was to apply pressure. Such a purpose is improper. The conduct is prejudicial to the administration of justice.

If Respondent thought he could prove actual bias, he should have filed his Motion To Recuse and produced his evidence. If he thought that he couldn't prove any grounds for recusal, he should have refrained from raising the issue.

Respondent's brief makes it clear that the letter was sent because a majority of The Public Service Commission (P.S.C.) wanted the allegation to be brought to the court's attention (brief p. 10, lines 10-12). The client's case was pending a decision on an Application For Rehearing. The case was decided four to three against Respondent's client with Justice Cole in the majority. The case involved The Public Service Commission's (P.S.C.) extending its jurisdiction and authority. The case was important to the P.S.C. The P.S.C. is a political body whose members are not restricted in their political activities like Judges are. It was clearly foreseeable that a member of the P.S.C. or their staff would provide a copy of the offending letter (Exhibit A) to the press. The P.S.C. was an important client to Respondent (See brief, p. 4, 1st paragraph). Respondent apparently gave into his client's wishes, and in doing so violated Ruled 8.4(d).

CONCLUSION

Under all of the circumstances involved, the issuance of the Private Reprimand With Notice for the 8.4(d) violation is the proper disposition of this matter.

LOUISIANA STATE BAR
ASSOCIATION COMMITTEE
ON PROFESSIONAL
RESPONSIBILITY

Frank J. Gremillion, Chairman
Elizabeth A. Alston
Robert J. Boudreau
Trevor G. Bryan
Robert M. Contois, Jr.
William W. Hall
Carrick R. Inabnett
T. Haller Jackson, III
Harvey J. Lewis
Christine Lipsey
Edmund McCollam
Gerard F. Thomas, Jr.

BY: /s/ G. Fred Ours
G. FRED OURS, ASSISTANT
COUNSEL

BY: /s/ Gerard F. Thomas, Jr.
GERARD F. THOMAS, JR.
COMMITTEE MEMBER
ASSIGNED

CERTIFICATE

I, G. Fred Ours, the undersigned counsel for the Petitioner, and the Committee on Professional Responsibility, do hereby certify that a copy of the foregoing Supplemental Brief has been mailed to the Respondent, Michael R. Fontham, and his attorneys, Noel J. Darce, Paul L. Zimmering, and David L. Stone by United States Mail, postage prepaid, this 3 day of January, 1990.

/s/ G. Fred Ours
G. FRED OURS, ASSISTANT
COUNSEL

APPENDIX E

LAW OFFICES
DAVID W. ROBINSON
ATTORNEY AT LAW
POST OFFICE BOX 314
BATON ROUGE, LOUISIANA 70821

721 NORTH STREET (70802)
TELEPHONE 504-344-6000
ABA NET 17808
TELECOPIER 504-387-1632

January 31, 1989

Committee on Professional Responsibility
Louisiana State Bar Association
210 O'Keefe Avenue, Suite 600
New Orleans, Louisiana 70112

RE: Formal Complaint against Michael R. Fontham

Dear Members of the Committee:

The undersigned are all lawyers from East Baton Rouge Parish and all have known Justice Luther F. Cole for many years. This complaint arises out of action by Mr. Fontham in the matter entitled "Cajun Electric Power Cooperative, Inc., et al v. The Louisiana Public Service Commission," being No. 88-CA-1719 on the docket of the Supreme Court, which is a case that originated in the 19th Judicial District Court for the Parish of East Baton Rouge. This complaint is filed in accordance with Rule 8.3(a) of the Rules of Professional Conduct which provides that "a lawyer possessing unprivileged knowledge of a violation of this code *shall* report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

Justice Cole practiced law in Baton Rouge for 16 years, was President of Baton Rouge Bar Association and served in the Louisiana House of Representatives. In 1966, he was elected to the bench of the 19th Judicial District Court. He was re-elected in 1972 and 1978. During that time, he also served as President of the Louisiana District Judges Association. In 1979, he was elected for an unexpired term on the Court of Appeal for the First Circuit. He was re-elected for a full term in 1980. On May 19, 1986, after having been elected earlier that year, he took his oath of office as an Associate Justice of the Supreme Court of Louisiana. He was recently re-elected, without opposition, for a full term on the Supreme Court. In Justice Cole, we have a man who practiced law for 16 years and then served in the judicial branch at all three levels for 23 years and has been elected by the people on many occasions. His reputation for honesty and integrity has never been questioned and has been earned over a period of several decades.

While the referenced litigation was pending before our Supreme Court on an application for rehearing, Mr. Fontham sent a letter to the Clerk of the Supreme Court (a copy of which is attached hereto). After setting forth certain information of which Mr. Fontham "was informed" but which he had not verified or confirmed, Mr. Fontham stated: "We assume that Justice Cole has evaluated the information for the purpose of determining whether to participate. We wish to insure that all members of the Court are apprised of these circumstances."

On December 17, 1988, the Baton Rouge Morning Advocate newspaper published an article concerning Mr.

Fontham's letter, which article also contained certain other comments by Mr. Fontham (a copy of that article is also enclosed). Essentially, the same information was published throughout the state via the Associated Press wire service. This media publicity could not have occurred had the letter not been made available.

An investigation of this matter should disclose that there was no basis for the action taken by Mr. Fontham nor was that action procedurally proper. Mr. Fontham's letter refers to the acquisition by Brooks-Harbour & Associates, Inc., of Barbay Engineers, Inc., but his own letter concedes that the rate and cost of service studies prepared by Barbay Engineers were prepared before the acquisition by Brooks-Harbour. And, contrary to the insinuations contained in Mr. Fontham's letter, through November of 1988 only 17 percent of the 1988 fees were for services rendered to electric cooperatives in Louisiana. Ironically, ten percent involved services rendered for the six cooperatives who had opted to be regulated by the Public Service Commission under the procedure adopted by the Louisiana Legislature and only seven percent involved services to the seven unregulated cooperatives which are the plaintiffs in the subject litigation. This is all confirmed by the letter of January 20, 1989, from Brooks-Harbour & Associates, Inc., attached hereto. It is also interesting to note that approximately 20 percent of Mr. Fontham's brief filed in the Supreme Court dealt with the alleged obligation of the plaintiffs to be assessed and to be obligated to pay his fees and those of others appearing on behalf of the Public Service Commission.

Also, extrajudicial statements and comments in a situation of this nature are totally improper. If there were any basis for making the allegations, the proper procedure would be to file a motion to recuse. Such a motion to recuse would have to set forth facts, and then the matter would be heard. Instead of mere insinuations, the true facts could have been obtained. (See Code of Civil Procedure Articles 151-161). However, in the instant case, no such motion was filed.

The clear import from the extrajudicial statements and the resulting publicity is that the public perceives the court granted a rehearing because Justice Cole had a personal interest in the case and should not have participated. This strikes at the heart of the integrity of the Supreme Court of Louisiana and, in effect, the whole judicial system. As an "officer of the court", Mr. Fontham gave the public cause to question whether the court is one of law or one of special interests brought to bear upon its decision making process. All of this is in addition to the totally improper insinuations made against one of Louisiana's most respected jurist.

Article III, Section 1 of the Articles of Incorporation of the Louisiana State Bar Association provides: "The objects and purposes of this association shall be to . . . .uphold the honor of the courts and of the profession of law. . . ."

Accordingly, we ask for an investigation of this matter, the result of which should lead to the imposition of serious sanctions on Mr. Fontham.

Some of the Rules of Professional Conduct which are applicable are:

Rule 3.6 Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or *reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.*

Rule 4.4 Rule for rights of third persons

In representing a client, a lawyer shall not use means that have *no substantial purpose other than to embarrass, delay or burden a third person,* or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 8.2 Judicial and legal officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or *with reckless disregard as to its truth or falsity* concerning the . . . integrity of a judge. . . .

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) Violate . . . The Rules of Professional Conduct. . . .

(d) *Engage in conduct that is prejudicial to the administration of justice;*

We request that you immediately notify Mr. Michael R. Fontham in writing of this complaint and proceed with an investigation leading to disciplinary measures as called for by Article XV of the Articles of Incorporation of the Louisiana State Bar Association.

Sincerely,

/s/ Charles Wm. Roberts

Charles Wm. Roberts
1626 Applewood Road
Baton Rouge, Louisiana 70808

/s/ David W. Robinson
David W. Robinson
P. O. Box 314
Baton Rouge, Louisiana 70821

/s/ A. Leon Hebert
A. Leon Hebert
701 Laurel Street
Baton Rouge, Louisiana 70802

/s/ Lawrence A. Durant
Lawrence A. Durant
721 Government Street
Baton Rouge, Louisiana 70802

/s/ Charles L. Patin, Jr.
Charles L. Patin, Jr.
644 Taylor Street
Baton Rouge, Louisiana 70802

/s/ Johnny C. Moore
Johnny C. Moore
318 St. Charles Street
Baton Rouge, Louisiana 70802

/s/ Ossie B. Brown
Ossie B. Brown
318 St. Charles Street
Baton Rouge, Louisiana 70802

/s/ Victor L. Roy, III
Victor L. Roy, III
P. O. Box 15928
Baton Rouge, Louisiana 70895

APPENDIX F

COMMITTEE ON PROFESSIONAL RESPONSIBILITY
LOUISIANA STATE BAR ASSOCIATION

601 St. Charles Avenue (504) 566-1600
New Orleans, Louisiana 70130

February 28, 1990

CERTIFIED/RETURN RECEIPT REQUESTED

Mr. Michael R. Fontham
Attorney at Law
546 Carondelet Street
New Orleans, Louisiana 70130

RE: FORMAL PRIVATE REPRIMAND
WITH NOTICE
COPR FILE: 10230

Dear Mr. Fontham:

On August 30, 1989, this Committee advised you that it had concluded its consideration of the complaint filed against you by Melvin A. Shortess, Charles Wm. Roberts, David W. Robinson, Victor L. Roy, III, A. Leon Hebert, Lawrence A. Durant, Charles L. Patin, Jr., Johnny C. Moore, and Ossie B. Brown and notified you of its intention to issue a Private Reprimand With Notice to Justice Luther F. Cole. The record reflects that your appeal filed in this matter has been denied. Accordingly, the committee on Professional Responsibility now issues its reprimand. The Committee finds as follows:

That in your capacity as Attorney at Law, you are representing the Louisiana Public Service Commission before the Supreme Court of Louisiana in a matter entitled *Cajun Electric Power Cooperative, Inc. v. Louisiana Public Service*

Commission, docket number 88-CA-1719. That following the issuance of the Supreme Court opinion, and while an application for rehearing was pending before the Court, you did, on or about December 7, 1988, deliver to the Clerk of the Supreme Court of Louisiana a letter relating to Justice Cole's participation in the above detailed case which you did request that the Clerk of Court transmit to the Court. A copy of said letter is hereby attached and incorporated herein as if copied in extenso. That a copy of your letter was provided to a member of the press and as a result the content of the letter was disclosed in the Baton Rouge Morning Advocate. That you did not forward to the Court, either with your letter of December 7, 1988 or subsequently, a Motion to Recuse Justice Cole pursuant to La. C.C.P. Arts. 151 and 159. That the combined effect of the public disclosure of the contents of your letter, combined with the fact that no Motion To Recuse was filed, resulted in a situation where the impartiality of a Supreme Court Justice has been called into question without the opportunity for a hearing and decision on the merits of that issue as provided for in La. C.C.P. Arts. 151 and 159. That you have engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4 (d) of the Rules of Professional Conduct of the Louisiana State Bar Association.

It is, therefore, the opinion of this Committee that the above referred to conduct constitutes violations of the Disciplinary Rules and/or the Rules of Professional Conduct of the Association. Such conduct, in the opinion of the Committee, necessitates appropriate disciplinary action. The Committee is of the belief that a Formal Private

Reprimand With Notice of Justice Luther F. Cole is sufficient discipline in this matter. This letter will constitute the committee's formal reprimand and although private and confidential, it will form a permanent part of your record with the Louisiana State Bar Association.

By direction and authorization of the Committee.

LOUISIANA STATE BAR
ASSOCIATION
COMMITTEE ON PROFESSIONAL
RESPONSIBILITY

Frank J. Gremillion, Chairman
Elizabeth A. Alston
Robert J. Boudreau
Trevor G. Bryan
Robert M. Contois, Jr.
William W. Hall
Carrick R. Inabnett
T. Haller Jackson, III
Harvey J. Lewis
Christine Lipsey
Edmund McCollam
Gerard F. Thomas, Jr.

BY:/s/ G. Fred Ours
G. FRED OURS,
ASSISTANT COUNSEL

GFO/kmf

APPENDIX G

Melvin A. Shortess
1401 Keed Avenue
Baton Rouge, Louisiana 70806

February 9, 1989

(Received February 14, 1989)

Committee on Professional Responsibility
Louisiana State Bar Association
210 O'Keefe Avenue, Suite 600
New Orleans, Louisiana 70112

RE: Michael R. Fontham

Dear Committee Members:

It was with great dismay that I read the December 17, 1988, edition of the Baton Rouge *Morning Advocate* early on a Saturday morning just before Christmas. The headline read, "Supreme Court to reconsider PSC decision." The subheadline was more specific, "Action follows question about Justice Cole's role in co-op case."

I know that our Code of Civil Procedure has specific provisions for the recusation of judges, including appellate judges. The grounds for recusation of all judges are enumerated in LSA-C.C.P. art. 151. The provisions of LSA-C.C.P. art. 159 set forth how the recusation of Supreme Court justices is accomplished. However, as I continued reading the news article, I learned that Justice Luther Cole had not been subjected to a recusation motion.

Instead, PSC lawyer Michael Fontham had on December 7 written to Supreme Court Clerk Frans Labranche to "apprise" all members of the Court that

Justice Cole's son-in-law worked for a firm which provides "substantial services to the seven co-ops in this case." The news article, rather long, continued in some detail. In my opinion, a reasonable person after reading this article would come away with the impression that improper conduct of a judge was involved.

Had Justice Cole perceived a problem, I am confident he would have voluntarily recused himself as he had already done in previous cases involving his son-in-law. If Mr. Fontham had a problem with Justice Cole's continued participation in the case, a motion to recuse was certainly an option available to him. But for Mr. Fontham to write this extra-judicial letter completely outside the parameters of our Code of Civil Procedure, while an application for rehearing was pending, smacks of unprofessional conduct in my opinion.

I have been informed that a formal complaint is now pending against Mr. Fontham. I do not wish this letter to be taken as a separate complaint, but I do call your attention to Canon 3B(1) and (3) of the Code of Judicial Conduct. My primary concern is for the administration of justice. I trust you will consider my observations in that light.

Very sincerely,
/s/ Melvin Shortess

MAS/lt

APPENDIX H

SUPREME COURT OF LOUISIANA
NUMBER 89-B-2161

IN RE: FORMAL PRIVATE REPRIMAND
COPR FILE NO. 10230

COMMITTEE ON PROFESSIONAL RESPONSIBILITY'S OPPOSITION TO APPEAL

TO THE HONORABLE CHIEF JUSTICE,
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF LOUISIANA:

Now into Court, through undersigned counsel, comes Appellee herein and informs the Court as follows:

I

On February 6, 1989, and February 14, 1989, letters of complaint were received by the Committee on Professional Responsibility in this matter. These letters with attachments are hereby attached, labeled "Exhibits A and B" and incorporated herein as if copied in extenso. The letter involved in this matter is contained in "Exhibit A" and is labeled "Exhibit A-1".

II

On April 11, 1989, the response of Michael R. Fontham was received in the Bar Association's offices. That response is hereby attached, labeled "Exhibit C" and incorporated herein as if copied in extenso.

III

Letters dated April 13, 1989 and May 1, 1989 were received by the Committee, through its counsel, from Marshall B. Brinkley, Secretary of the Louisiana Public Service Commission, and Robert L. Rieger, General Counsel of the Louisiana Public Service Commission. These letters are hereby attached, labeled "Exhibits D and E", and are incorporated herein as if copied in extenso.

IV

On May 18, 1989, a letter from Frans J. Labranche, Jr., Clerk of the Supreme Court of Louisiana, was received in the Bar Association's offices. That letter if [sic] hereby attached, labeled "Exhibit F", and is incorporated herein as if copied in extenso.

V.

On July 21, 1989, correspondence was received by Committee's counsel from Charles Wm. Roberts. That letter is hereby attached, labeled "Exhibit G", and is incorporated herein as if copied in extenso.

VI

On August 30, 1989, the Formal Private Reprimand notice letter was forwarded to Respondent. A copy of that letter is hereby attached, labeled "Exhibited H", and incorporated herein as if copied in extenso.

VII

Two screening panels of the Committee have reviewed this matter and the Committee as a whole has considered this matter in plenary session. A majority of the Committee is of the opinion that the Private Reprimand With Notice to Justice Cole is warranted in this case.

VIII

The law provides the procedure for the recusal of Supreme Court Justices pursuant to La. C.C.P. Arts. 151 and 159. Art. 159 requires that a motion to recuse a Supreme Court Justice be heard by the other justices of the Court. At the hearing on a Motion To Recuse, evidence and argument can be received from *both* sides of the issue. The letter mailed to the Court by Respondent does not afford either the opposing party or Justice Cole an opportunity to present evidence or argument on the issue of recusal.

IX

In his appeal, Respondent states: "The factual representations in the letter were accurate and the Committee has not challenged their accuracy." In fact, the Committee does not reach any conclusions as to the accuracy of the representations alleged in Mr. Fontham's letter. The Committee's position is that the proper vehicle and forum for the taking of evidence and argument concerning the representation alleged in the letter, and the issues involved, are provided by La. C.C.P. Arts. 151 and 159. Neither the

Louisiana State Bar Association, nor the Committee on Professional Responsibility are the appropriate forum for deciding the merits of the allegations raised in Mr. Fontham's letter to the Court. Similarly, neither the Committee's inquiry nor this appeal are the appropriate vehicle for deciding the merits of those allegations.

X

The Committee does not find that Mr. Fontham either did or did not personally forward a copy of the letter in question to a member of the press. Clearly, a copy of the letter in question was provided to the press by someone. Clearly, Mr. Fontham controlled the initial distribution of the letter that he drafted and sent to the Court. As a result of the fact that a copy was provided to the press by someone, the allegations were published in the newspaper. The possibility that someone would release the letter to the press and the press would publish the allegations was certainly foreseeable. Neither the opposing party nor Justice Cole were afforded the opportunity, to present evidence and argument in open Court relative to the allegations, that they would have had under La. C.C.P. Art. 159.

XI

The conduct of Respondent in sending the letter in question to the Court, and in otherwise distributing it, where it was foreseeable that someone would release the letter to the press who would publish the allegations, was prejudicial to the administration of justice. The Private

Reprimand With Notice is appropriate under the circumstances.

WHEREFORE, the Committee prays that the appeal be denied and the Committee on Professional Responsibility's decision to issue a Private Reprimand With Notice be upheld.

Submitted by:

LOUISIANA STATE BAR
ASSOCIATION
COMMITTEE ON PROFESSIONAL
RESPONSIBILITY

BY:/s/ G. Fred Ours
G. FRED OURS,
ASSISTANT COUNSEL

CERTIFICATE

I, G. Fred Ours, the undersigned counsel for the Petitioner, and the Committee on Professional Responsibility, do hereby certify that a copy of the foregoing Opposition To Appeal has been mailed to the Respondent, Michael R. Fontham, and his attorney, Noel J. Darce, by United States Mail, postage prepaid, this 22 day of September, 1989.

/s/ G. Fred Ours
G. FRED OURS,
ASSISTANT COUNSEL

(2)

Supreme Court, U.S.
FILED
JUN 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1776

In The

Supreme Court of the United States

October Term, 1989

MICHAEL R. FONTHAM,

Petitioner,

versus

COMMITTEE ON PROFESSIONAL RESPONSIBILITY,
LOUISIANA STATE BAR ASSOCIATION,

Respondent,

Brief In Opposition To Petition For Certiorari

G. Fred Ours
Assistant Disciplinary Counsel
Counsel of Record

James R. Barrow
Chief Disciplinary Counsel

601 St. Charles Avenue
New Orleans, Louisiana 70130
Phone: (504) 566-1600

Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

May an attorney be disciplined for an improper attempt, by the attorney, to influence a State Supreme Court's decision in a civil case by means outside that states Code of Civil Procedure?

LIST OF PARTIES TO THE PROCEEDING

Michael R. Fontham

The Disciplinary Board of the Louisiana State Bar Association, as successor to the Committee on Professional Responsibility, Louisiana State Bar Association

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In addition, the case law is discussed in the Committee on Professional Responsibility's Supplemental Brief which is attached to Petitioner's Brief at pages APP 9 through APP 29.

OPINION BELOW

The opinions below are noted in Petitioner's Brief and are reproduced at Appendix A, pages A-1, and Appendix B, commencing at page A-2, of the Petitioner's Brief. These opinions are unpublished opinions by the Louisiana Supreme Court and its disciplinary arm.

JURISDICTION

Jurisdiction to Review the judgment of the Louisiana Supreme Court by Writ of Certiorari is conferred by 28 U.S.C. 1257 (a) and Rule 10.1 (C) of the United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States Amendment X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Rule 8.4 (d) of the Louisiana State Bar Association Rules of Professional Conduct provides:

> It is professional misconduct for a lawyer to:
> (d) Engage in conduct that is prejudicial to the administration of justice.

Louisiana Code of Civil Procedure, Art. 151, provides:

> Art. 151. Grounds
>
> A. A judge of any court, trial or appellate, shall be recused when he

is a witness in the cause.

B. A judge of any court, trial or appellate, may be recused when he

(1) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause;

(2) At the time of the hearing of any contested issue in the cause, has continued to employ, to represent him personally, the attorney actually handling the cause (not just a member of that attorney's firm), and in this case the employment shall be disclosed to each party in the cause;

(3) Has performed a judicial act in the cause in another court;

(4) Is the spouse of a party, or of an attorney employed in the cause; or is related to a party, or to the spouse of a party, within the fourth degree; or is related to an attorney employed in the cause; or to the spouse of the attorney, within the second degree; or

(5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.

> C. In any cause in which the state, or a political subdivision thereof, or a religious body or corporation is interested, the fact that the judge is a citizen of the state or a resident of the political subdivision, or pays taxes thereto, or is a member of the religious body or corporation, is not a ground for recusation.

Louisiana Code of Civil Procedure, Art. 159, provides:

> Art. 159. Recusation of supreme court justice
>
> When a written motion is filed to recuse a justice of the supreme court, he may recuse himself or the motion shall be heard by the other justices of the court.
>
> When a justice of the supreme court recuses himself, or is recused, the court may (1) have the cause argued before and disposed of by the other justices, or (2) appoint a judge of a district court or a court of appeal having the qualifications of a justice of the supreme court to act for the recused justice in the hearing and disposition of the cause.

STATEMENT OF THE CASE

Petitioner was privately reprimanded by letter dated February 28, 1990. The substance of that reprimand details the misconduct involved and is reproduced here for the reader's convenience.

> That in your capacity as Attorney at Law, you were representing the Louisiana Public Service Commission before the Supreme Court of Louisiana in a matter entitled Cajun Electric Power Cooperative, Inc. v. Louisiana Public Service Commission, docket number 88 -CA-1719. That following the issuance of the Supreme Court opinion, and while an application for rehearing was pending before the Court, you did , on or about December 7, 1988, deliver to the Clerk of the Supreme Court of Louisiana a letter relating to Justice Cole's participation in the above detailed case which you did request that the Clerk of Court transmit to the Court. A copy of said letter is hereby attached and incorporated herein as if copied in extenso. That a

copy of your letter was provided to a member of the press and as a result the content of the letter was disclosed in the Baton Rouge Morning Advocate. That you did not forward to the Court, either with your letter of December 7, 1988 or subsequently, a Motion to Recuse Justice Cole pursuant to La. C.C.P. Arts. 151 and 159. That the combined effect of the public disclosure of the contents of your letter, combined with the fact that no Motion to Recuse was filed, resulted in a situation where the impartiality of a Supreme Court Justice has been called into question without the opportunity for a hearing and decision on the merits of that issue as provided for in La. C.C.P. Arts. 151 and 159. That you have engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4 (d) of the Rules of Professional Conduct of the Louisiana State Bar Association.

SUMMARY OF THE ARGUMENT

I

Petitioner's misconduct does not involve protected speech. Communications which are intended to improperly influence a court in deciding a case, and which are made outside of the procedures established for raising issues before a court, are not protected speech.

II

Petitioner's statement that the letter involved is factual and accurate is nct established by the record herein. Since no motion to recuse was filed, no hearing was held on the allegaticns of fact, the conclusions implied or

inferences to be drawn in Petition's letter. There is no finding by any finder of fact establishing whether the allegations, conclusions, or inferences involved in the letter are true or not true.

III

Any inference that the content of the letter involved herein was somehow instrumental in righting a wrong or correcting a miscarriage of justice is erroneous and should be disregarded. The reversal of the underlying civil case by the Louisiana Supreme Court on rehearing turned on issues of law and not upon a revelation contained in Petitioner's letter.

ARGUMENT

Petitioner characterized this matter as a case of unwarranted infringement upon his first amendment free speech rights. This is not the case. All speech is not protected speech. Certain types of speech, which seek to improperly influence a public official's conduct, are in fact clearly illegal and can be subject to criminal sanctions. Bribery, blackmail, and extortion are examples of such unprotected speech. This is not to imply or infer that Fontham's letter constitutes bribery, blackmail, extortion, or any other criminal conduct. Clearly, that is not the case. However, Fontham's letter was intended to influence the Louisiana Supreme Court's decision on Fontham's

pending Application For Rehearing in a case that was very important to Fontham's client, the Louisiana Public Service Commission.

Petitioner admits that the intent behind the letter was to influence the remaining Louisiana Supreme Court Justices vis-a-vis Justice Cole's opinions in this case. See Petition For A Writ of Certiorari, page 7, wherein Petitioner states:

> Nevertheless, the Commission and counsel were concerned that the other members of the court should be aware of Justice Cole's relationship with Mr. Harbour in the deliberations concerning the rehearing application. In those deliberations, Justice Cole presumably would share his views with other justices. Mr. Fontham and those he consulted believed that the Commission was entitled to be ensured that all

> members of the court were aware of the relevant circumstances in considering the rehearing application.

See also Petition For A Writ Of Certiorari, page 18, wherein Petitioner states:

> The Committee tried to justify its reprimand by claiming that the statements were punishable since they were not made in a motion for recusal. But Fontham did not seek to force the recusal of Justice Cole, who already had participated in the case. A motion for recusal would likely have caused embarrassment to the court and would have required a showing of actual bias. Fontham sought to make the entire court aware of the relevant facts, since Justice Cole's participation in deliberations could affect the views of the other justices in deciding the merits.

These statements, the text of, and the context surrounding the letter delivered to the Court by Fontham, make it

clear that the intent behind the letter was to convince six of the seven Louisiana Supreme Court Justices that Justice Cole was improperly biased in this case and that his views should be disregarded. It should be noted that the original decision was by a four to three vote with Justice Cole in the majority. Fontham's application for rehearing was pending before the Louisiana Supreme Court at the time the letter was delivered.

It is also clear that a conscious decision was made not to file a motion to recuse Justice Cole because Fontham could not prove grounds for recusal under La. C.C.P. Art. 151 (reproduced supra). Having determined that he could not prove that Justice Cole was actually biased in the matter, Fontham, nevertheless, sought

to convince six of the justices of the Louisiana Supreme Court that Justice Cole was biased by means of the offending letter. The letter is a blatant attempt to influence the Louisiana Supreme Court's judgement in a case before that court by means outside the procedures set forth in Louisiana law. Clearly, a state has the right to establish procedures to insure that legal matters in its court s proceed in an orderly manner. Louisiana has a right to set forth the grounds for which its judges can be recused. La. C.C.P. Art. 151 (reproduced supra) does so in a reasonable manner. Art. 151 applies to Louisiana Supreme Court Justices. See La. C.C.P. Art. 159. The recusation procedures adopted by the Louisiana Legislature provide for the filing of a Motion To Recuse, and for a hearing to

give the mover an opportunity to prove his allegations. Fontham, knowing that he could not prove grounds for recusal, sought to circumvent the orderly administration of justice in an attempt to improperly influence the Louisiana Supreme Court's decision on a case pending before it. Such speech is not protected speech.

II

Petitioner contends that his statements in the offending letter are true, factual, and accurate. This assertion is not established by the record herein. Fontham chose not to file a motion to recuse because he could not prove that Justice Cole was actually biased. Thus, by Petitioner's own choice, he avoided the hearing called for in the Louisiana Code of Civil Procedure. Since

there was no hearing on Fontham's statements contained in the offending letter, there is no finding establishing whether those statements are true, accurate, and factual or not. Absent such a finding, the truth, accuracy, or factual basis for such statements cannot be assumed.

III

Justice Cole was not removed from the case by the other justices following receipt of the letter by the Court. The Court did not consider the letter to be a Motion To Recuse. See Appendix A, a letter from the Clerk of the Louisiana Supreme Court contained in the record of this matter before the Louisiana Supreme Court, as Exhibit F, to the Committee on

Professional Responsibility's Opposition To Appeal.

A review of the original decision by the Louisiana Supreme Court, and the decision on rehearing [Cajun Electric Power Cooperative, Inc. v. Louisiana Public Service Commission, 544 So.2d 1372 (La. 1988), Reversed on rehearing, 544 So.2d 362 (La. 1989)] establishes that the reversal, by a split court, turns on issues of Louisiana Constitutional and statutory interpretation and not upon any supposed bias of a member of the Court.

Justice Cole participated in both the original decision and the decision on rehearing, wherein he dissented in part, concurred in part, and assigned reasons. There is nothing in the rehearing opinion which indicates that the Louisiana

Supreme Court found any injustice or any impropriety on Justice Cole's part in the rendering of the original decision. The reversal was based upon points of law.

Any inference that the content of Fontham's letter caused the Louisiana Supreme Court to conclude that its original decision was somehow unjust, or that Justice Cole's participation was somehow improper is unwarranted. There is nothing in the record which suggests that the Louisiana Supreme Court granted rehearing to right some wrong, or to correct a miscarriage of justice. Any such inference is erroneous and should be disregarded.

CONCLUSION

The letter involved in this case is an improper attempt to circumvent the orderly administration of justice and to improperly influence the decision of a court of law in a matter pending before that court. This is not a case of a lawyer being disciplined for exercising his right to speak freely. The speech involved is not protected. It would be improvident to grant the writ.

Repectfully submitted,

G. Fred Ours
Assistant Disciplinary Counsel
Counsel of Record

James R. Barrow
Chief Disciplinary Counsel

601 St. Charles Avenue
New Orleans, Louisiana 70130
Attorneys for Respondent

APPENDIX

APPENDIX A

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

CHIEF JUSTICE
JOHN A. DIXON, JR.
ASSOCIATE JUSTICES
PASCAL F. CALOGERO, JR.
WALTER F. MARCUS, JR.
JAMES L. DENNIS
JACK GROZIER WATSON
HARRY T. LEMMON
LUTHER F. COLE
CLERK OF COURT
FRANS J. LABRANCHE, JR.

May 17, 1989

301 LOYOLA AVE., 70112
TELEPHONE 504-568-5707

G. Fred Ours
Louisiana State Bar Association
601 St. Charles Ave.
New Orleans, LA 70130

Re: Letter from Michael Fontham

Dear Fred:

Concerning your inquiry in the matter Cajun Electric Power Cooperative, Inc., et al vs. The Louisiana Public Service Commission, No. 88-CA-1719, during the time the case was pending on an application for rehearing, a letter was received from Michael Fontham concerning Justice Cole's participation in the case. On December 7, 1988, that letter was filed and circulated to the Court. The letter was not accompanied by a motion to recuse and the letter itself was not written in such a manner as to be considered a motion.

Within a day or two after receipt of this letter, I received a call from Mr. Joe Gyan, a reporter for the Baton Rouge Morning Advocate who inquired whether Justice Cole was going to recuse himself in this case. Mr. Gyan repeated to me some of the information

which was contained in Mr. Fontham's letter. The information which Mr. Gyan had was virtually identical to that contained in Mr. Fontham's letter.

I explained to Mr. Gyan that the letter had been filed as a letter. I further advised him that no motion for recusal of Justice Cole had been filed. If I can furnish you with any other information concerning this matter, please advise.

With warm personal regards, I remain.

Very truly yours,

/s/ Frans J. Labranche, Jr.
Frans J. Labranche, Jr.
Clerk of Court

FJLJr:wpb